

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2004B155(C)**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JENNIFER ALLISON and ROY ALLISON,

Complainants,

vs.

DEPARTMENT OF CORRECTIONS, LIMON CORRECTIONAL FACILITY,

Respondent.

THIS MATTER came on for hearing on October 5, 6, and 7, and November 15, 2004, in the offices of the State Personnel Board before Administrative Law Judge Mary S. McClatchey. Complainants appeared through counsel, Barry Roseman, Esquire. Respondent appeared through Melanie Sedlak, Assistant Attorney General.

MATTERS APPEALED

Complainants, Jennifer Allison (“Mrs. Allison” or “Jennifer Allison”) and Roy Allison (“Mr. Allison” or “Roy Allison”) appeal their termination from employment by Respondent, Department of Corrections (“DOC” or “Respondent”), Limon Correctional Facility (“LCF”). Complainants seek imposition of an alternate, lesser form of discipline, back pay, and an award of attorney fees and costs.

For the reasons set forth below, Respondent’s actions are **affirmed.**

ISSUES

1. Whether Complainants committed the acts for which they were disciplined;
2. Whether Respondent’s disciplinary actions were arbitrary, capricious or contrary to rule or law;
3. Whether Complainants are entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Complainants are married and live in Limon, Colorado.
2. Complainants have been certified employees at DOC for over twelve years.
3. Jennifer Allison was a Medical Records Technician II in the Clinical Services Unit of the medical facility at LCF. She was responsible for scheduling, maintaining medical records of inmates, and continuity of care issues.
4. Roy Allison was a Correctional Support Trades Supervisor II (Maintenance). He was the Plumbing Supervisor at LCF, responsible for overseeing all plumbing services at the prison. He directly supervised approximately six inmates who had access to tools that could be used for escapes.
5. Prior to the incidents addressed herein, neither Complainant had ever received a corrective or disciplinary action.
6. In early February 2004, Mrs. Allison's brother, James Allen, appeared at the Allisons' home, unannounced. Mr. Allen was six years junior to his sister, and the Allisons had helped raise him during his early teen years. Mrs. Allison felt protective of her younger brother. He had had a criminal history and they were aware of it; in fact, they had posted bond for him once in recent years. Mr. Allen was homeless, had run out of money, and had no job. It was not unusual for Mr. Allen to appear unannounced at their home.
7. Mr. Allen asked if he could stay at the Allisons' home for a while. Although the Allisons would have preferred that he not stay with them, they allowed him to do so. They had an extra bedroom, and he stayed there.
8. Mr. Allen performed some odd jobs around the house for the Allisons. However, after some time, the situation at home became strained. Mr. Allen paid for nothing, and when he used Mr. Allison's tools in the garage, he often rearranged them in such a way that Mr. Allison could not find them.
9. Mr. Allison became extremely upset about his situation at home. He informed his wife it was either "him or me." He never followed through on this threat, but the marriage was strained during this period.

Mr. Allison's Comments to Coworkers

10. Mr. Allison worked the day shift, starting at 7 a.m. During the first half hour of every shift, he and his crew had informal conversations about work and personal matters. During several of these morning informal discussions, Allison made comments about his brother-in-law that were inappropriate. He made the following statements,
 - his brother-in-law had been staying with them for over a month and was driving

- him crazy, washing clothes at 11 p.m..
 - he wanted to get rid of him;
 - he could probably make money from Crime Stoppers for turning him in, but it would probably cause a divorce;
 - he joked about turning him in for a reward on several occasions;
 - he wished someone would call the police and turn him in, so that he would leave his house;
 - his brother-in-law was wanted by the police in at least two front range counties;
11. One of the co-workers to whom Allison made these statements was Dale Kudlock. He was a captain, but he did not have managerial line authority over Allison. In fact, he was intimidated by Allison.
 12. Kudlock was very concerned about Allison's statements, believing them to be inappropriate. He believed Allison was in violation of the DOC Code of Conduct, and he reported Allison's comments to Allison's immediate supervisor, Tom O'Brien.

Allisons' Knowledge of Warrant for Mr. Allen's Arrest

13. It is likely the Allisons knew about the warrants for Mr. Allen's arrest from the time he arrived at their home in early February.
14. Both Allisons admit that on or about February 27, 2004, Mr. Allen informed the Allisons that he had recently failed to make a Colorado Springs court hearing, because he had no money for gas necessary to drive there.
15. On or about February 27, 2004, the Allisons knew that at least one warrant for Mr. Allen's arrest had been issued by the court in Colorado Springs, that he had skipped bond, and that he was a fugitive from justice.¹
16. The Allisons told Mr. Allen to call his attorney and straighten out the situation. He informed them he was probably going to go to Kansas with a friend. Jennifer Allison warned him, "they have computers in Kansas too," or words to that effect, meaning that he would be subject to arrest in any state to which he fled.
17. The Allisons did not call the police to turn in Mr. Allen. He left their home the next day.

March 3, 2004

18. On March 3, 2004, Mr. Allen returned to the Allison residence.

¹ Customarily, when a criminal defendant fails to appear for a court hearing and has been previously released from jail on a bond, the bond is revoked and a warrant is issued for the defendant's arrest.

19. In the meantime, Jolene Martinez, the bonding agent for Mr. Allen, had received a tip that he was at the Allison's home, and had been surveilling the house for a few days. Martinez and Allen had been friends at one time; Martinez had even rented a room to Allen for a time. However, the friendship had soured, as Mr. Allen had now skipped bond and Martinez faced the loss of the bail amount she had posted on his behalf, \$5000.00.
20. Martinez called the Allison residence in mid-day on March 3, 2004, and Allen answered the telephone. Martinez hung up and did not identify herself.
21. Having confirmed that Allen was at the Allison residence, Martinez immediately contacted the Limon Police Department and spoke to Officer Tony Schiefelbein. He opened an investigation into the Allison's for harboring a fugitive. Martinez asked him to go to the Allison home to arrest Mr. Allen. Jason Crouse, Martinez's son who worked with her, faxed Officer Schiefelbein the mug shot of Allen, the court "failure to appear" paperwork, and information concerning Allen's Toyota Chinook motor home.
22. Officer Tony Schiefelbein went to the Allison home to arrest Mr. Allen at approximately 2:00 p.m. Mr. Allen was upstairs hiding and did not answer the door.
23. Officer Schiefelbein then called the Allison's and left a message on their home telephone answering machine.
24. Allen overheard the message and called Jennifer Allison at work to inform her that the police officer had come to the house looking for him, and had left a message on her machine. She then called home to pick up the message, and called Officer Schiefelbein; however, the dispatcher had to take her number and have him call her back. Officer Schiefelbein did not have time to call Mrs. Allison back on March 3, 2004.
25. At the time Jennifer Allison called Officer Schiefelbein, she knew that her brother was hiding at her home when he had come to her home to arrest him on the warrant. She did not inform anyone at the Limon Police Department of this.
26. When Roy Allison returned home from work that day, he called Officer Schiefelbein. Schiefelbein knew that the Allison's worked for DOC and was very concerned about the potential adverse impact of the situation on their jobs. He told Mr. Allison that he had received a call from the bail bondswoman, that Mr. Allen had skipped bond and failed to appear for a court appearance leading to issuance of a warrant for his arrest, and that Mr. Allen was reported to have been at their house. He urged Mr. Allison to take care of the problem and get it cleared up, either by having Mr. Allen turn himself in or by calling Officer Schiefelbein when he next saw Mr. Allen.
27. During this conversation, Mr. Allison told Officer Schiefelbein that he had not been aware that there was a warrant for Allen's arrest. At the time he made this statement, he knew it was not true. It is also likely that Allison had spoken to his wife, and knew that Allen was at

their home at that time.

28. When Mrs. Allison arrived at home that evening, Mr. Allison informed her of his conversation with Officer Schiefelbein. Soon after her arrival at home, Martinez appeared looking for Mr. Allen. Martinez stated that she was looking for Mr. Allen, that an arrest warrant had been issued on him, and that if she did not find him, she would lose \$5,000.00. The Allisons knew she had been Mr. Allen's bonding agent, but refused to turn over Mr. Allen, whom they knew to be hiding in their home. They were uncooperative and demanded that she show identification, ultimately sending her away empty handed.
29. The Allisons claim that they were unaware that Martinez was the bail bondsperson who had posted bail for Mr. Allison. This testimony is rejected as self-serving and has no weight. See Finding of Fact #47.2
30. That night the Allisons told Mr. Allen he had to leave. He did.
31. They did nothing to assist the police in arresting him, knowing that this decision would cause them to be "in trouble" with DOC.

March 8, 2004 Telephone Call Between Mrs. Allison and Mr. Allen

32. On March 8, 2004, in the evening, Mrs. Allison called her son's house in Matheson, Colorado, just five minutes from her home. Her son Chris Allison had a construction business, and her brother had worked for Chris during parts of February 2004.
33. Mrs. Allison learned that her brother had been staying on her son's property, in his small motor home, since departing from her home on March 3. By this time, Mrs. Allison realized that her brother was never going to turn himself in to the police.
34. At this point, she made a final judgment call on what to do about her brother. She decided she still would not turn him into the police. Instead, she urged him to "just get away," to leave her son's home. She did not want his presence on her son's property to cause her son any problems.
35. On March 9, 2004, Martinez and Crouse arrived at Chris Allison's house to capture Mr. Allen and take him to jail. A fight ensued between the bailbondspeople and Chris Allison. They used mace on Chris Allison. Chris's wife contacted Jennifer Allison to report Chris had been hurt. The Allisons drove to the house. The police arrived.
36. Martinez and Crouse found Mr. Allen hiding in the garage, placed him in their vehicle, and he was ultimately taken to jail.

2 Both Allisons claim that after Martinez left that night, Mr. Allen informed them that she was her bail bondswoman.

37. On March 10, 2004, Mrs. Allison reported to Associate Warden Steve Hartley at LCF that her brother, a fugitive from justice, had been at her home, and had finally been arrested on March 9, 2004.
38. On March 10, 2004, Mr. Allison went to his direct supervisor, Officer Tom O'Brien, and reported the following: his wife's brother was wanted by the police and had been at their house for approximately one week; he knew that the brother had been in trouble but was told by the brother that the matter had been settled; that when the bondspeople came to his house looking for the brother he had told them he did not know where he was; that on March 9 the brother had been arrested at his son's house; that the bondswoman lied when she talked to police.
39. On March 11, 2004, LCF placed both Allisons on administrative leave pending investigation into the events of February and March 2004.

Investigations of Possible Criminal Activity

40. On March 3, 2004, Officer Ronny Jones, a criminal investigator for DOC's Inspector General's Office ("IG"), was assigned to investigate the Allisons for being an accessory to a crime by harboring a fugitive. A confidential informant had come forward with information for LCF administrators that a fugitive, James Allen, was staying at the Allisons' residence.
41. Jones opened an investigation into whether the Allisons had violated C.R.S. sections 18-8-105, Accessory to crime, and 18-8-404, First degree official misconduct.
42. Under the law cited above, "A person is an accessory to crime if, with intent to hinder, delay, or prevent the discovery, detection, apprehension, prosecution, conviction, or punishment of another for the commission of a crime, he renders assistance to such person." "Render assistance" means to "harbor or conceal the other" or "By force, intimidation, or deception, obstruct anyone in the performance of any act which might aid in the discovery, detection, apprehension, prosecution, conviction, or punishment of such person."
43. Under the law cited above, First degree official misconduct occurs when a "public servant" "refrains from performing a duty imposed upon him by law; or violates any statute or lawfully adopted rule or regulation relating to his office."
44. Jones performed a computer criminal record search on Allen and immediately learned that an arrest warrant had issued on him for failure to appeal in court on an El Paso County felony criminal matter. This warrant is known as a "fugitive warrant." Jones contacted Jolene Martinez, the bail bondswoman who had issued the bond for Mr. Allen on the El Paso matter. She stated she had been to the Allison residence previously that day and that Roy Allison had said Mr. Allen was not there, and he had not seen him for days.
45. Jones asked Associate Warden Steve Hartley and Lt. T.A. Smelzer to assist him with

interviews for the investigation. Over twelve interviews were conducted.

46. Officer Smelzer wrote an Intelligence Report on March 5, 2004, which contained the following information:
- DOC employees had reported that Roy and Jennifer were harboring a fugitive of justice, Jennifer's brother, who was staying with them and was "on the run" from the law. The brother had warrants from the front range area; he had bonded out and then had taken flight.
 - Roy Allison had complained to others at work about having his brother-in-law stay at his house for approximately two and a half months, and he had jokingly said that he should turn him in for the reward money because he was wanted.
 - Bounty hunters had staked out the Allison residence for a few days, using another residence in the area, with permission, and on March 3 had called the Allison residence and spoken with Allen. They had then contacted the Limon Police Department for assistance in arresting Allen. The police had attempted a "knock and talk" at the residence, but there was no answer. They had then left a message on the home phone, had spoken with Roy and Jennifer on the same day, and that Roy had informed the police officer "that the brother in law had been at his house last weekend, but he and Jennifer did not know he was wanted." Jennifer had stated that he "had left town, in route to Oklahoma, in a black Monte Carlo."
 - The confidential informant requested that his name not be used because he feared retaliation by Roy Allison, including that his life would be in danger.
47. On March 11, 2004, Officer Hartley and Investigator Jones interviewed Mr. Allison. The report of that interview contains the following: Allison stated that his wife's brother had come to stay with them about a month ago. He had no money so they allowed him to stay. He had worked for his son at his construction company. He said as far as he knew all of James' problems had been taken care of. He had spoken to the police, and later the same day a woman came looking for James, saying there was a warrant for his arrest. He knew she was someone in authority but did not know she was a bailbondsperson. He denied that James was in the house when she came, contrary to what his wife had said. He indicated that he received a call from his son's house and arrived to find that James had been picked up, and his son had been injured and maced.
48. On March 11, 2004, Officer Hartley and Investigator Jones also interviewed Mrs. Allison. The report of that interview contains the following: Her brother had come to stay with them because he was out of money and had no place to stay. She said he was at her house for approximately one month and had told her about a week ago that he missed a court hearing. She said she had told him to get it taken care of. She stated that she had received a call from her brother indicating the police had been at the house and had left a telephone message for

her. She called to retrieve the message and called Officer Schiefelbein. She indicated her brother had been home when the officer came to the house, but did not answer the door. Regarding Martinez, she said later that night “a lady showed up wanting to find her brother. She said the lady told her she was going to lose \$5,000.00 if she didn’t find him. She also said the lady didn’t identify herself as a bondsperson. Jennifer said that her brother was hiding in the attic in her house at this time. She said that she told the lady that she didn’t know where her brother was at that time. . . . [On October 8 she called her son’s house and said the lady] had been by and knows where he was at. She said this wasn’t true, but she wanted to get her brother to leave her son’s house and to just get away. She said she talked to her brother to tell him this.” Then she related the events of March 9.

49. The Allison’s versions of what had occurred differed. Mr. Allen had stated, “as far as he knew all of James’ problems had been taken care of,” and that when the bailbondswoman came, Allen was not in his house. Mrs. Allison had stated that a week prior, Mr. Allen had informed them of his warrant for arrest due to the missed court date. In addition, Mrs. Allen admitted to having lied to Martinez about Mr. Allen not being in the house.
50. The Allison’s claim that they were unaware Martinez had bonded Mr. Allen out of jail when she arrived at their home on March 3 has no weight. Mr. Allison admitted on March 11 to having heard her say that there was a warrant for his arrest. Mrs. Allison admitted on March 11 to having heard her say that she was going to lose \$5,000 if she didn’t find him. Those statements, when viewed in the context of the police seeking to execute on the warrant for his arrest on the same day, establish that the Allison’s knew Martinez had bonded Mr. Allen out of jail and was attempting to recoup her money.

Pre-disciplinary Meeting – Jennifer Allison

51. Each of the Allison’s had a different appointing authority. Therefore, the disciplinary processes are presented separately herein.
52. On March 19, 2004, Mrs. Allison’s appointing authority, Barry Pardus, Assistant Director of Clinical Services at LCF, sent her a letter noticing a pre-disciplinary meeting pursuant to Rule R-6-10. The letter did not mention any performance issues that would be addressed at the meeting as potential grounds for discipline. In fact, it mentioned only “possible violations of Administrative Regulation 1450-1, Staff Code of Conduct.”
53. Allison knew that the subject of the meeting would include the events involving her brother in February and March 2004. She had no prior warning that other performance issues would be addressed.
54. In preparing for the meeting, Pardus reviewed Jennifer Allison’s personnel file. He found a few old counseling memos and a January 2004 Performance Improvement Plan (“PIP”). Pardus made inquiries with Ms. Allison’s direct supervisor, Carolyn Brisendine, regarding these items. He met with Carolyn Brisendine before the pre-disciplinary meeting. She

reported that Jennifer Allison's performance had been deteriorating recently.

55. The January 2004 PIP contained the following items in need of improvement in order to be at a Satisfactory level:
 - grievances were not being processed timely; they needed to be processed when received;
 - she was arriving at and leaving work up to thirty minutes after the appropriate time; she needed to be at work from 8 – 5;
 - she was remaining involved in scheduling issues, which were now to be handled through central scheduling;
 - she needed to organize the administrative duties she had been recently assigned (ordering supplies, sending bills for payment, filing).
56. The PIP required that these items receive "immediate attention."
57. On April 1, 2004, Allison attended the R-6-10 pre-disciplinary meeting with her union representative. Pardus and a Human Resources representative, were also present.
58. Pardus opened the meeting by sharing a two-year old confirming memorandum and asking Allison to explain it. She did. He then asked her about a November 2003 memo regarding a lost order for cervical collars. Allison explained what had occurred and pointed out, "this part's new to me because I was a Scheduler and Records Keeper for . . . up until our budget cuts. And then they threw me into Admin. III stuff too."
59. Pardus then asked Allison whether her PDQ and evaluation form had been modified to reflect her different duties. She stated that her PDQ had been modified in March 2004 [the month Mrs. Allison was placed on administrative leave].
60. A current copy of Mrs. Allison's PDQ is not in the record.
61. Allison and her representative then clarified that she had not been trained in her new duties, because the Administrative Assistant III, part of whose job duties she had taken, had left the unit while Allison was on medical leave for surgery. Allison was out for several months for that surgery.
62. Pardus then discussed the PIP, noting that the duties listed were not yet in her PDQ, but that she had signed it anyway. Allison explained that with all the change in the unit, she did her best to help get it all done.
63. Pardus asked Allison to talk about the grievance processing. She explained that when she returned from surgery she was informed she had new duties, including the grievance processing, in addition to her record duties. Pardus informed her that Brisendine had told him that the grievance processing still had not improved. She stated she had been out of the

office since March 11 and that at the time she left she was keeping things in different areas, that she had a grievance log, that a co-worker was assisting with data entry of the grievances, that she [Allison] was not getting copies of those answered, which was supposed to occur. At hearing, Allison clarified that she had two separate work areas due to her two separate types of duties, and had created two piles of grievances.

64. Pardus asked her about the scheduling incident. She clarified it was one incident, and told him about it.
65. Pardus asked her about invoices or billing statements being up to 144 days overdue. She responded that she knew of only one. At the time Pardus asked her this question, he had in his possession a March 23, 2004 memo written by Carolyn Brisendine to Chris Petrozzi, Clinical Services Unit Director, concerning documents she had found at Allison's work area after her departure on administrative leave on March 11, 2004.
66. Pardus shared neither the memo nor any of the information in it with Allison either before or at the R-6-10 meeting. He therefore did not give her an informed opportunity to defend herself against the contents of that memo, which he did use in imposing discipline against her.
67. Pardus asked Allison if she had a history of needs improvement ratings in certain areas. She stated that no, in fact she had a history of outstanding or commendable job performance ratings until her current unit Director, Petrozzi, arrived.
68. Pardus was unfamiliar with Allison's former and present job duties, the work of her unit, and how layoffs had affected her job, at the time of the pre-disciplinary meeting. After the meeting, he never read her March 2004 Position Description Questionnaire to assure he knew her job duties.
69. The meeting then turned to the issue of Mr. Allen. Allison explained that she and her husband had put him up because he was homeless. She stated that he had informed them in late February that he had missed a court date, and that she had told him to turn himself in and contact his attorney.
70. In the course of discussing the events of March 3, Allison omitted from her story the fact that Allen had called her at work after the police had attempted to find him at their home. Pardus asked her an open-ended question, and she responded, "I called home and had gotten my messages and had a message to call. So I had called the police department and dispatch had told me it was Officer Schieffelbein"
71. The Human Services representative asked Allison if she ever considered informing the Warden or someone in Clinical Services about the situation. Allison stated that she had, but "it was just a struggle between, you know, just hoping that I could convince him to just go and get it taken care of without having to . . . go to [that] extent, you know trying to get him

just [to] realize that he needed to go get it taken care of 'cause that was the only way he was going to be able to get on with his life.”

72. Complainant’s union representative asked that Pardus consider her length of service at DOC of thirteen years, her clean disciplinary record, and that additional duties had been added, for which she had not been trained.
73. At the meeting, Mrs. Allison claimed that she had not known Martinez was a bailbondswoman when she came to the house on March 3, because she had not identified herself as such. That statement was not true. Pardus asked her, “Once you found out [that Martinez was a bail bondswoman looking for Allen] did you feel that there was maybe a need to let someone here know that that had happened?” She responded, “Yes and no, this is my brother. It was difficult.”
74. Allison also explained to Pardus that on March 8 she had called her son’s house to try to talk Allen into leaving their home. She stated that she realized he was not going to turn himself in, and wanted to have her son and daughter-in-law avoid a bad situation. She said, “I [was] just trying to get my brother to just go.”
75. Pardus concluded that Jennifer Allison had violated the DOC Code of Conduct, sections (IV)(V), (N), (X), and (ZZ), set forth below. He concluded she had lied about Martinez not identifying herself as a bail bondswoman. He believed her conduct was extremely serious, and had discredited her and the Department. He conclude that her conduct had also jeopardized the safety and security of LCF and the Limon community because if learned by inmates, it could be used against her.

Termination Letter for Jennifer Allison

76. On April 9, 2004, Pardus sent Mrs. Allison a letter terminating her employment. The letter cited the following:
 - A. her work performance over the past two years had been carefully monitored, and showed a “disturbing downward trend in the core factors of Accountability/Organizational Commitment and Job Knowledge. Your work performance has been deficient in the following areas listed below” [wherein he lists slow processing of grievances, not following directions consistently by continuing to participate in scheduling, and not discussing difficulties in accomplishing her job duties, particularly her administrative duties such as “billing statements up to 144 days overdue, second requests from attorneys for copies of offender records not responded to”, both items from the March 24, 2004 memo.]
 - B. “You have been counseled, by your supervisor, frequently both verbally and in writing about the need for improvement in these core areas. A Performance Improvement Plan was written and presented to you on January 16, 2004, and it is clear that these areas of

improvement are still not ‘Satisfactory.’”

- C. “You acknowledged that the grievance processing was not fixed and that this is not appropriate. You claimed that the reason for this is that you were not adequately trained.” He states that her noncompliance with grievance processing timelines places the division and DOC “at a liability and risk that is unacceptable. In addition, failure to process offender grievances potentially compromises the health of the offender.”
- D. “According to the Investigative Report from the Colorado Department of Corrections Criminal Investigation Division, you are charged with two offenses; Accessory to a Crime and First Degree Official Misconduct. You admitted you were aware that your brother . . . had absconded on bail when on March 3, 2004 a bail bondsperson visited your home.” He relates further information about March 3 and the ultimate abduction of Allen.
- E. “Although [he] is your brother, the Department’s expectation for all staff is the duty to report one’s associations with those persons who are involved in criminal activities. . . . you knew that your brother was wanted by the law enforcement community between March 3 and March 9, 2004. You admitted at the meeting that you failed to properly report your association with a known felon to your supervisor and/or those in your chain of command.”
- F. As a thirteen-year veteran of DOC, she had been fully trained in DOC expectations for staff to comply with the law and use good judgment and sound discretion.
- G. “As members of the law enforcement community and the criminal justice system, the employees of this Department are expected to conduct themselves in a manner that reflects positively upon the Department and its mission. You knew your brother was wanted by the police, and your choice to deliberately shield him from the authorities does not exhibit the qualities of good judgment and sound discretion required by the Department of its employees.”
- H. “The Department’s mission is one of public safety, and your actions between March 3, 2004 and March 9, 2004 adversely impact the Department’s mission of protecting the public safety.
- I. “it is my decision that you have knowingly violated the following provisions of the Department’s Administrative Regulation 1450-1.
 - (IV)(V) “Staff will not knowingly associate or deal with persons who are known or suspected to be involved in illegal activities,”
 - (IV)(N) “Any action non or off duty on the part of DOC staff that jeopardizes the integrity or security of the Department, calls into question the staff’s ability to perform effectively and efficiently in his or her position, or casts doubt upon

the integrity of the staff, is prohibited. Staff will exercise good judgment and sound discretion,”

- (IV)(X) “Staff shall neither falsify any document nor willfully depart from the truth, either in giving testimony or in connection with any official duties or official investigation,” and
- (IV)(ZZ) “Any act or conduct, on or off duty, which affects job performance and which tends to bring the DOC into disrepute, or reflects discredit upon the individual as a correctional staff, or tends to adversely affect public safety, is expressly prohibited as conduct unbecoming, and may lead to corrective and/or disciplinary action.”

Pre-Disciplinary Meeting - Roy Allison

77. On April 1, 2004, Roy Allison attended the R-6-10 meeting with his union representative. Warden Al Estep and a Human Resources representative were also present. During the meeting, he informed Warden Estep that he and Jennifer had helped to raise James Allen in his early teen years, and that he had no money, food, or place to go when he appeared at their home in early February. He stated that in late February Allen had informed him and Jennifer that he had missed a court date and had an outstanding warrant. [This was different information than that which he had shared with the investigators on March 11, 2004.] He stated that he had said to his wife several times that they would get in trouble over it, and that he had not pushed the issue because he felt it would have led to a divorce.
78. Regarding the events of March 3, Mr. Allison informed Warden Estep that Mr. Allen had reappeared at his home before the bondswoman arrived. When she arrived they thought he had “slipped out the back door.”
79. During this meeting Mr. Allison told Estep twice that he and his wife had had no idea where Mr. Allen was during the period March 3 through the date of his ultimate arrest at his son’s house, March 9, 2004. He stated, “And that was the first time we knew he was at their house. We thought he was just gone.” On a third occasion later in the meeting, Warden Estep asked, “did you know that Mr. Allen was hiding in the home of your son Chris Allison?” Mr. Allison responded, “No I didn’t.” This was not true; in fact, he and his wife were aware that he was there on the evening of March 8, 2004, when Mrs. Allison spoke with Mr. Allen.
80. Warden Estep asked Mr. Allison what was his understanding of, his training in, what he was supposed to with an individual like Mr. Allen. Allison stated that he should have called the police and turned him in.
81. During the meeting, Warden Estep reviewed all of the pertinent sections of AR 1450-01 that he felt might apply to the situation. They included all of those listed in the termination letter, below.

82. Warden Estep read all investigative reports by DOC and the Limon Police Department, and spoke to Investigator Jones and Officer Hartley at length about the results of the investigations
83. Estep concluded correctly that Allison had not been truthful about recent events on several occasions.
84. Warden Estep concluded that Mr. Allison had violated the Code of Conduct, section (IV)(J), which states, "Professional relationships with colleagues will be of such character as to promote mutual respect, assistance, consideration, and harmony within DOC and with other agencies." He believed strongly that Allison's comments to coworkers about having a relative at home who had warrants for his arrest pending, and wanting to call Crime Stoppers, "placed an extreme burden on staff." He felt that staff have to have a high level of trust in each other in the prison setting, based on a belief that they will "be there for each other" and can be trusted to follow the prison regulations.
85. He felt that Allison's comments put his coworkers in a no-win situation: either they had to betray his confidence by reporting him and turning in his brother-in-law, or they had to violate the prison regulations by remaining silent. Warden Estep determined that Allison had "destroyed those professional relationships."
86. Allison argued at hearing that his statements to coworkers, one of whom was higher up the chain of command, were an attempt to actually "report" the situation involving Allen and a cry for help, to prompt someone else to turn his brother-in-law in. This contention is rejected as a self-serving after-thought and has no weight.
87. Estep concluded that Allison had violated Code of Conduct section (IV)(M), which states, "Staff shall avoid situations which give rise to a direct, indirect, or perceived conflict of interest." Warden Estep concluded that Allison's lack of integrity had created a conflict of interest between his private interests and his position at DOC, his duty as a member of the law enforcement community to uphold and enforce the law. He reasoned that the central mission of DOC is to keep felons off the street, and that Allison had violated that mission by keeping a known felon with a warrant for his arrest in his own home.
88. He further reasoned that DOC staff are expected to abide by the laws, hold the highest of standards for themselves, and to avoid conflicts of interest with law enforcement, because as peace officers at DOC, they are part of the law enforcement community designed to exact a price for violations of the law.
89. Warden Estep concluded that Allison had also violated Code of Conduct, section (IV)(N), which provides,

"Any action on or off duty on the part of DOC staff that jeopardizes the integrity or security of the Department, calls into question the staff's ability to perform

effectively and efficiently in his or her position, or casts doubt upon the integrity of the staff, is prohibited. Staff will exercise good judgment and sound discretion.”

90. Warden Estep believed that Allison’s conduct had demonstrated a troubling lack of integrity and extremely poor judgment, and that he had violated DOC’s trust.
91. Estep also concluded that Allison had violated Code of Conduct section (IV)(V), which states, “staff will not knowingly associate or deal with persons who are known or suspected to be involved in illegal activities.” He reasoned that the Allisons were suspected themselves of being involved in the illegal activity of harboring a fugitive, and that Mr. Allen was involved in illegal activities by failing to turn himself in on the arrest warrant.
92. Estep concluded correctly that Allison had lied when speaking with the Limon police, in violation of Code of Conduct section (IV)(X), which prohibits staff from willfully departing from the truth in connection with any official duties or official investigation. Allison had lied to Officer Schiefelbein in stating that neither he nor Mrs. Allison had been aware that Allen had warrants for his arrest pending. He has also lied to the DOC investigators on March 11 in claiming that he and Mrs. Allison were unaware that Martinez was a bonding agent.
93. Estep concluded that Allison had violated Code of Conduct section (IV)(U), which states,

“when a staff member is the subject of an external investigation, . . . or is required to appear as a defendant in any criminal court, that staff member will immediately inform and provide a written report to his/her appointing authority who shall inform the IG’s Office.”
94. Allison was the subject of an external investigation by the Limon Police Department for harboring a fugitive. He was subjected to questioning by Office Schiefelbein on the issue and had a duty to report that interview to DOC.
95. Estep also concluded that Allison had violated Code of Conduct section (IV)(ZZ), which states,

“Any act or conduct, on or off duty, which affects job performance and which tends to bring the DOC into disrepute, or reflects discredit upon the individual as a correctional staff, or tends to adversely affect public safety, is expressly prohibited as conduct unbecoming, and may lead to corrective and/or disciplinary action.”

Termination of Mr. Allison

96. On April 9, 2004, Warden Estep sent a termination letter to Mr. Allison. He reviewed several of the items discussed at the pre-disciplinary meeting, including Mr. Allison’s mitigating information presented. In addition, he listed what he viewed as several disparities

between Allison's statements to various individuals, and the reports of investigators. While Estep was wrong on one of these points (Mrs. Allison had not stated in her pre-disciplinary meeting that Martinez had identified herself on March 3), the gist of the letter is accurate.

97. The letter closes with the following summary:

“Your choice of not cooperating with the authorities by accurately reporting your brother-in-law's whereabouts to law enforcement when you knew he was wanted by the police constitutes willful misconduct under the Department's Code of Conduct. Your deliberate act adversely affects public safety because an absconder from the law is being protected by an employee of the Department of Corrections. This Department's mission is to protect public safety. This mission is compromised by an employee who encourages criminal behavior. The Department can appreciate that an employee of the Department may have a relative who is an offender or who is suspected of engaging in criminal activities. . . . Your conflicting statements to the investigator, and to the Limon Police Department indicates a lack of personal integrity on your part. These statements are a willful departure from the truth. . . .”

98. Mr. and Mrs. Allison are found not to be credible. Their statements to the police, to DOC investigators, to their appointing authorities, and their testimony at hearing, were inconsistent.
99. Both appointing authorities were credible. Notably, Mr. Pardus admitted at hearing to his lack of knowledge of the performance issues concerning Mrs. Allison, and made no attempt to appear more knowledgeable than he was.

DISCUSSION

I. BURDEN OF PROOF

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; § 24-50-125, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule R-6-9, 4 CCR 801 and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) willful failure or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen, supra*. The Board may reverse the agency's decision if

the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, it must be determined whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

II. MRS. ALLISON COMMITTED MOST OF THE ACTS FOR WHICH SHE WAS TERMINATED; MR. ALLISON COMMITTED ALL OF THE ACTS FOR WHICH HE WAS TERMINATED

A. Jennifer Allison.

Performance issues. Respondent failed to prove that Mrs. Allison's work performance was worthy of disciplinary action. There was no evidence that Mrs. Allison continued to engage in scheduling, which had been removed from her job duties. With respect to the timely processing of grievances, Respondent failed to prove that the piles of grievances found on her desk by Brisendine on March 24, had not been processed. Copies of some of those grievances had been made; some had not. The evidence was too vague to render findings of fact on the status of the papers found on Mrs. Allison's desk.

There is a simple explanation for this. The evidence was never developed at the agency level. It strains reason to understand how Brisendine and Pardus concluded that disciplinary action was appropriate regarding the contents of the March 24, 2004 memo, when a) Allison never saw the memo and had no idea what was in it; b) Allison never had the opportunity to review those piles of documents and to explain them. Pardus had no idea that Allison maintained two separate workstations, given the dual nature of her duties in the clinic; and, he had never reviewed her current PDQ. Without a full vetting of the facts between the appointing authority and the employee, at the pre-disciplinary meeting, Respondent was unable to prove by preponderant evidence at hearing that Mrs. Allison was in violation of the grievance processing guidelines and other performance standards.

Mrs. Allison's Actions Regarding her Brother. Respondent did prove that Mrs. Allison acted with a complete lack of integrity and in an extremely dishonest, unprofessional manner concerning Mr. Allen, in violation of several provisions of the DOC Code of Conduct. DOC is an agency charged with enforcing the criminal laws of the State of Colorado. As such, it is an integral part of the law enforcement community and the criminal justice system. As a DOC employee, Mrs. Allison was a representative of the law enforcement community. DOC promulgated the staff Code of Conduct in order to assure that its staff comport with the highest of standards relating to compliance with and enforcement of the law. Mrs. Allison's actions demonstrate that she either did not appreciate her status as part of the law enforcement community, or that she did not care about that

status.

The heart of Complainant's argument is that because she acted on only the best of personal motives, namely, loyalty to and protection of her brother, this constitutes sufficient mitigation to render termination too harsh a sanction. While it is easy to sympathize with Mrs. Allison's feelings, and while they do constitute mitigation, her actions were flagrant and serious.³

Mrs. Allison lied on several occasions throughout this ordeal, in violation of section (IV)(X) of the Code of Conduct. On March 11, 2004, Mrs. Allison lied to DOC investigators about not understanding Martinez was a bonding agent when she came to her home on March 3, 2004. She repeated this lie in her pre-disciplinary meeting with Mr. Pardus.

While Complainant argued at hearing that poor judgment does not subject one to disciplinary action, that assertion is incorrect. Section (IV)(N) of the Code of Conduct states that "any action of a staff member that casts doubt upon the integrity of the staff is prohibited. Staff will exercise good judgment and sound discretion." In addition, section (IV)(ZZ) states that any conduct on or off duty that tends to bring DOC into disrepute, or reflects discredit upon the individual as a correctional staff, is expressly prohibited. Mrs. Allison deliberately hid her brother from the bail bondswoman on March 3, 2004, and failed to turn him over to the police on February 27 and 28, and then again after he reappeared on March 3. These actions constitute serious violations of these provisions of the Code of Conduct, appropriately subjecting her to disciplinary action.

Perhaps most troubling, however, is what occurred on March 8, when Mrs. Allison spoke to her brother on the telephone at her son's house. On that evening, Mrs. Allison had reconciled herself to the fact that her brother would not be turning himself in. She had therefore reached a critical decision point: either urge him to escape, thereby defrauding Martinez out of her \$5,000.00 bond money, and supporting him in eluding escape by the police; or, call the police and assure that her brother did not get into further trouble. The latter course of action might well have saved her job.

Mrs. Allison chose the wrong path. She decided to join her brother in actually encouraging him to continue to skip bond, which would ultimately result in Martinez losing her money. This is a shocking example of lack of integrity that reflects poorly on DOC. This conduct brings DOC into disrepute. The agency, as a part of the criminal justice system, simply cannot be expected to reinstate an employee who has encouraged a wanted felon to skip bond and run away from the police.

Mrs. Allison also violated section (IV)(V) of the Code of Conduct. This provision states, "Staff will not knowingly associate or deal with persons who are known or suspected to be involved in illegal activities." As a threshold matter, Mrs. Allison herself was engaged in potentially illegal activity by harboring a wanted criminal. She knew her brother was wanted on a felony criminal

³ While Mrs. Allison appears to have been trying to act in her brother's best interest, it goes without saying that this too was an egregious error in judgment. Given the fact that Mr. Allen would eventually be captured and jailed, it was clearly in his best interest for her to turn him in.

matter; he had therefore engaged in illegal activity. It was illegal for him to fail to appear at his court hearing. It was illegal for him to evade arrest after the arrest warrant had been issued. Mrs. Allison knowingly associated with a person known or suspected to be involved in illegal activity.

B. Roy Allison.

Respondent proved that Mr. Allison committed the acts upon which discipline was based. It is unnecessary to repeat the discussion of Mrs. Allison's violations herein. Mr. Allison committed the same violations. With respect to the issue of making false statements to investigators, Mr. Allison made more false statements than Mrs. Allison. He started by telling Officer Schiefelbein on March 3 that he and his wife had been unaware of the warrant for Mr. Allen's arrest. Warden Estep also correctly concluded that Mr. Allison had lied repeatedly concerning his knowledge of the fact that Martinez was a bonding agent when she came to their home on March 3.

Warden Estep, a more experienced appointing authority than Mr. Pardus, cited Mr. Allison with violations of several additional provisions of the Code of Conduct. Respondent proved that Mr. Allison violated all of the provisions cited in the termination letter. See Findings of Fact #84 through #95. Warden Estep's analysis of how Mr. Allison's conduct violated the provisions of the Code of Conduct was insightful, accurate, and compelling. Of particular import was his concern about how Mr. Allison's comments to coworkers about harboring a wanted felon in his own home created an impossible situation for them: either breach his trust and turn him in, or breach DOC regulations and remain silent.

III. RESPONDENT'S DECISION TO IMPOSE TERMINATION ON BOTH ALLISONS WAS NOT ARBITRARY OR CAPRICIOUS. THE VIOLATION OF BOARD RULE R-6-10 CONCERNING MRS. ALLISON WAS HARMLESS ERROR

A. Jennifer Allison. Mr. Pardus violated Board Rule R-6-10 in his handling of the discipline of Mrs. Allison, with respect to performance issues. The sole purpose of the R-6-10 meeting is to give the employee a meaningful opportunity to provide mitigating and explanatory information. This purpose is completely defeated if the appointing authority gives the employee no advance warning of the subject matter of the meeting. In his letter to Mrs. Allison noticing the pre-disciplinary meeting, Mr. Pardus did not mention any performance issues. When she arrived at the meeting, she had no idea that the issues would be discussed.

Rule R-6-10 also requires the appointing authority, at the meeting, to "present information about the reason for potential discipline, disclose the source of that information unless prohibited by law, and give the employee an opportunity to respond." Pardus violated this provision by using the March 24, 2004 memo against Mrs. Allison without ever sharing its contents with her, and without explaining that the source of the information was a search of her desk after she had been placed on administrative leave.

Notwithstanding this rule violation, the imposition of termination against Mrs. Allison was appropriate because of the serious nature of her remaining violations. She was an employee of the

Department of Corrections, not another state agency with no affiliation to law enforcement or the criminal justice system. She worked at a prison, and she assisted her brother in evading arrest and in depriving a bonding agent of a \$5,000.00 bond she had posted in good faith on her brother's behalf. Then, she lied about some of the events in connection with the ordeal. These actions demonstrate such poor judgment and lack of integrity, and reflect so poorly on DOC, that it was reasonable for the agency to terminate Mrs. Allison's employment based on those events alone.

B. Roy Allison. Termination of Mr. Allison's employment was fully warranted, for the reasons set forth above. While Complainants both argued that their conduct did not actually rise to the level of a violation of the criminal laws, and therefore termination is not warranted, that issue is not controlling. The Allison's' conduct was flagrant and serious; it was a blow to the mission of DOC. They both severed any future possibility of a relationship based on trust because of their lack of integrity throughout the process, up to and including lying about it. Termination was appropriate.

IV. ATTORNEY FEES AND COSTS ARE NOT WARRANTED

Complainants request an award of attorney fees and costs against Respondent. Section 24-50-125.5, C.R.S. states,

“Upon final resolution of any proceeding related to the provisions of this article, if it is found that the personnel action from which the proceeding arose or the appeal of such action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless, the employee . . . or the department, agency, board or commission taking such personnel action shall be liable for any attorney fees and other costs incurred . . .”

Because they did not prevail on their appeal, an award of attorney fees is not warranted.

CONCLUSIONS OF LAW

1. Complainant Jennifer Allison committed most of the acts upon which the discipline was based;
2. Complainant Roy Allison committed all of the acts upon which the discipline was based;
3. With respect to Jennifer Allison, Respondent violated Board Rule R-6-10; however, that violation was harmless error;
4. Respondent's actions were not arbitrary, capricious, contrary to rule and law;
5. Complainants are not entitled to an award of attorney fees and costs.

ORDER

The actions are affirmed and Complainants' appeals are dismissed with prejudice.

DATED this ____ day of
December, 2004, at
Denver, Colorado.

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln St., Suite 1420
Denver, CO 80203

CERTIFICATE OF MAILING

This is to certify that on the ____ day of **December, 2004**, I placed true copies of the foregoing **INITIAL DECISION AND NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Barry Roseman, Esquire
Roseman & Kazmierski, LLC
1120 Lincoln Street, Suite 1607
Denver, Colorado 80203

And in the interagency mail to:

Melanie Sedlak
Assistant Attorney General
Employment Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203